Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

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COMMENTS OF
OHIO INTERNET SERVICE PROVIDERS ASSOCIATION,
TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION,
AND WASHINGTON ASSOCIATION OF INTERNET SERVICE PROVIDERS

The Ohio Internet Service Providers Association ("OISPA"), the Texas Internet Service Providers Association ("TISPA"), and the Washington Association of Internet Service Providers ("WAISP") (collectively, "Commenters") submit these comments in response to the above-captioned notice of proposed rulemaking examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[1] OISPA, TISPA and WISPA are trade associations comprised of Internet Service Providers ("ISPs") operating in Ohio, Texas, and Washington state, respectively. Members of OISPA, TISPA, and WAISP provide service to consumers, businesses, governments, public institutions, and universities. The members of

[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*NPRM*").

OISPA, TISPA, and WAISP are non-facilities based ISPS that provide service via connectivity obtained primarily from incumbent local exchange carriers ("ILECs").

I. INTRODUCTION AND SUMMARY

The Commission formally announced in the *NPRM* that its current primary policy goal is to promote the ubiquitous availability of broadband services to all Americans. Commenters believe that the Commission's stated goal will not be achieved by the methods the Commission proposes in the *NPRM*. Moreover, the Commission's tentative conclusion that the provision of wireline broadband Internet access service over self-provisioned facilities is an information service is misguided and over-reaching and, if adopted, would have serious negative ramifications for the ISP community, and, Commenters believe, for the American public. The *NPRM* raises the serious possibility that the Commission favors the elimination of Title II requirements for some or all broadband transmission capability deployed by wireline common carriers. Such a ruling could seriously harm the availability of these essential facilities to competing ISPs. As discussed in these comments, the elimination of key Title II statutory obligations to which the ILECs are subject would be unlawful and would not promote the availability of broadband services to all Americans. Deregulation of ILEC broadband capability would merely provide ILECs with greater flexibility to delay introduction of network improvements that they would otherwise be compelled to make in response to competition, and would give them more power to thwart intramodal competition.

To promote its broadband goals, the Commission instead should reaffirm that the ILECs' broadband capability is, and will continue to be, subject to Title II, all of the pro-competitive obligations of the 1996 Act, and the *Computer Inquiry* unbundling obligations. The enforcement of these regulatory requirements is a prerequisite to broadband competition and will promote the

Commission's broadband goals while also encouraging the ILECs to deploy an advanced broadband capability.

Experience has shown that the ILECs make little effort to innovate and develop new and improved service offerings and facilities in the absence of competition. Their recent deployment of broadband facilities has been prompted primarily by the innovative provision of service by ISPs and other competitors made possible by the 1996 Act, which in turn motivated the ILECs to begin deploying such facilities on a more widespread basis (in response to the threat of competition). It would be unlawful and misguided for the Commission to now exempt the ILECs' broadband facilities from the very statutory and regulatory requirements that in large part contributed to the existence of the broadband choices available today.

Regardless of the merits of the *Cable Modem Declaratory Ruling,* there is no basis for extending the reasoning of that decision to wireline broadband Internet access service. As the Commission recognized in the *Cable Modem Declaratory Ruling*, the fact that common carriers have for many years been subject to obligations to unbundle transmission services they use to provide information services over their own networks distinguishes them from cable operators.

In order to promote competition in, and consequently the widespread availability of wireline broadband services, the Commission should determine that facilities-based wireline broadband Internet access service is a bundled offering of a telecommunications service (subject to Title II) and information service. Facilities-based wireline broadband Internet access service is such a bundled offering because this service primarily provides to the customer no more than a transparent transmission path to third-party content providers, in the same way that the voice network provides a pathway for end users to obtain various third party-provided audiotext information sources including stock quotes and banking information. In fact, end users demand

and expect that the service provider will not change the format or content of information received from third party sources. In other instances, wireline broadband Internet access service providers use telecommunications to provide an information service, such as access to email stored on the provider's server. Wireline broadband Internet access is not a seamless information service because the transparent transmission path is functionally separate from information services and is perceived as such by end users.

Non-facilities-based ISPs merely use telecommunications services obtained from others, and therefore provide only information services, as the FCC has previously found. The fact that the Commission for the last 25 years has asserted Title II jurisdiction over the transmission component of ILEC networks that they use to provide information services by itself demonstrates that this transmission component is subject to Title II. Thus, under *Computer Inquiry* requirements, which the *NPRM* correctly declares apply to ILECs, ILECs may use their own DSL services to offer high speed Internet access services, but, pursuant to Title II, are required to make DSL services available to other ISPs on a nondiscriminatory basis.

Moreover, applicable case law defining common carriage, as well as all of the policy and public interest considerations underpinning common carrier designation, require that this capability be subject to Title II and unbundling obligations. Under *NARUC I* and *II,* and the cases cited therein, ILECs are making an offer to the public at large to provide telecommunications for a fee sufficient to trigger common carrier status for this transmission component of wireline broadband Internet access. Moreover, common carrier status is compelled under the Act and common law in light of the ILECs' ownership and control of the quintessential bottleneck facilities – the local loop. In and of itself, the fact that the ILECs own

and control the bottleneck local loop facilities provides an extremely compelling public interest justification for application of Title II obligations to ILEC broadband capability.

The ability of independent ISPs to obtain basic network functions on a nondiscriminatory basis has been the foundation for the growth and success of the Internet and its attendant public interest benefits. Permitting ILECs to discriminate in favor of their own ISP operations to any significant extent would allow the ILECs to extend their monopoly control of the loop to the unregulated information services marketplace, a result that the Commission has for 25 years sought successfully to avoid.

There are overwhelming public interest benefits that dictate preserving the Title II obligation that ILECs offer to competitors the broadband capability that they use for their own Internet access service as a telecommunications service. Preserving the ILECs' Title II obligations in this context would preserve eligibility under Section 251(c) for unbundled access by competitive carriers to broadband network elements. It would also assure the long term viability of universal funding which is applicable to entities that "provide" telecommunications or telecommunications service. Requiring LECs to offer broadband capability as a telecommunications service would also preserve other important requirements that apply to the provision of telecommunications service including CALEA, CPNI requirements, and access to telecommunications services by persons with disabilities.

The application of Title II to ILEC broadband capability is the best alternative to achieve the Act's goal of a deregulatory framework for provision of telecommunications. The Commission may deregulate under Title II when it is appropriate to do so under forbearance authority under Section 10. On the other hand, the Commission has no experience fashioning safeguards under Title I and the scope of the Commission's authority under Title I is unformed

and untested. Accordingly, the Commission should fashion a deregulatory framework for broadband by retaining Title II authority and deregulating as appropriate, rather than attempting to do so by sweeping all of broadband into Title I. This approach also permits establishment of an intermodal level playing field by applying Title II to all broadband platforms and forbearing or waiving rules where appropriate.

Elimination of Title II regulation of ILEC broadband capability is not necessary in order to permit ILECs to compete intermodally. ILECs currently are permitted to compete and provide broadband information services as customers of their own tariffed broadband telecommunications services. Under that framework, (and as the ILECs themselves have trumpeted when it serves their interests), the ILECs have succeeded spectacularly, experiencing record breaking-growth in DSL subscribership.

The Commission should retain and strengthen *Computer III* safeguards against discrimination. The *Computer III* regulatory framework has been the foundation for the growth and success of the Internet. The *NPRM* does not make a compelling case that marketplace conditions have changed sufficiently, or at all, to permit elimination of *Computer III* safeguards. The *NPRM's* statements that those safeguards were somehow limited to the voice network are incorrect. The Commission in *Computer III* stated that it intended to, and did, fashion a framework that could accommodate the evolution of the network to a more advanced capability. Thus, key *Computer III* safeguards are not technology-specific. Instead, they are broad anti-discrimination requirements that can be, and are, equally applied in a narrowband or broadband environment. In particular, the requirement that ILECs provide Internet access as customers of their own tariffed services is fully at home and necessary in a broadband wireline environment.

The Commission should conclude this proceeding by reaffirming that ILECs' broadband capability is fully subject to Title II and the safeguards established in the *Computer Inquiry* proceedings.

II. BROADBAND INTERNET ACCESS SERVICE IS, AND SHOULD REMAIN, SUBJECT TO TITLE II

A. Facilities-Based Wireline Broadband Internet Access Service Is A Bundled Offering With A Telecommunications Service And An Information Service Component

1. Wireline Broadband Internet Access Is Comprised of A Transparent Transmission Service And An Information Service

In the *NPRM*, the Commission stated that:

> [a]n entity provides 'telecommunications' (as opposed to merely using telecommunications) when it both provides a transparent transmission path and it does not change the form or content of the information.[2]

The Commission further stated that:

> it seems as if a provider offering the [broadband wireline Internet access] service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end users with wireline broadband Internet access service.[3]

As reflected by these statements, self-provisioned wireline broadband Internet access is a bundled offering of a telecommunications service and information services because sometimes the provider is providing telecommunications in that it provides no more than a transparent transmission path, and sometimes it is merely using telecommunications to provide an information service.

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2 *NPRM*, para. 25.

3 *Id.*

In fact, in most instances the customer of Internet access service is using, and the provider provides, no more than a transparent transmission path. While the users in many applications have the capability to change the appearance and format of content they receive or send, these capabilities are not provided by the wireline provider but by software in the end users' computer and/or the information content provider to which the end user chooses to connect. Thus, in Web access, changes in the appearance of information on the user's screen are controlled and determined by either the end user or the content provider. Moreover, the IP protocol starts on the end user's computer and is transmitted unchanged by the ISP. The user also controls the points on the Internet to which he is connected. Thus, to a large extent, Internet access service involves no more than provision of a transparent transmission path. As some telecommunications experts have observed:

> And any service provider whose core business is to transmit TCP/IP-encoded traffic is – as a matter of pure technological definition – providing pure carriage. As described above, TCP/IP places *complete* control over routing, addressing, origin, destination, and content itself in the hands of the originating computer. Any forced bundling in this environment has to be contrived, concocted and clumsily grafted onto the underlying carriage. TCP/IP is the universal protocol of *unbundled, equal access* carriage – a protocol that is content-neutral, network-neutral, medium-neutral. It is, in short, the purest form of "common carriage."[4]

[4] Michael Kellogg, John Thorne and Peter Huber, Federal Telecommunications Law, Section 11.8.1, Second Ed, 1999.

Moreover, the fact that the user is using the transmission path provided by the wireline provider to connect to content providers does not render the transmission service an information service. The traditional telephone network has always provided users the ability to retrieve information. Users are able to use the voice network to connect to numerous sources of stored information such as banking information, stock quotes, news, entertainment information, horoscope, weather, and time of day. This use of the voice network by the end user is conceptually identical to use of Internet access to retrieve information on the Web.

Further, there is a charge associated with provision of the pure transmission path which is part of the total charge for wireline broadband Internet access. Therefore, the Commission may, and should, conclude that the self-provisioned transmission function of wireline broadband Internet access is a telecommunications service when provided to, and used by, the end user.

On the other hand, there are instances where the wireline provider is using the pure transmission path to provide information services functions, rather than providing telecommunications. Thus, when a wireline provider's user accesses Email on a wireline provider's server or goes to a personal web page stored by the wireline provider, the wireline provider is using telecommunications to provide an information service. [5]

Therefore, wireline broadband Internet access is a bundled offering of both a telecommunications and an information service component, because sometimes the

[5] All ISPs permit users to change the default opening Web page. Thus, the user in Web browsing may never connect to content provided by the ISP. This capability to change the default web page is a feature of the Web browser software resident on the user's computer.

wireline provider is providing no more than telecommunications, and at other times it is using telecommunications to provide an information service.

2. Wireline Broadband Internet Access Is Not a Single Inextricably Intertwined Service

The Commission has recognized that merely combining an enhanced service with a basic service offering for a single price does not always constitute a single enhanced service offering. In determining whether the offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct services."[6] Previously, the Commission has concluded that Internet access should be classified as a single information service because it offers end users information service capabilities inextricably intertwined with data transport.[7]

The *NPRM* tentatively concluded that wireline broadband Internet access service is a single information service offering, but failed to explain why it is not, in fact, two functionally separate and distinct services. By statutory definition, telecommunications is functionally different from add-ons that could constitute an information service, such as changes in the form and content of information. Therefore, when providers are providing no more than a pure transmission service they are offering something that is functionally distinct from the information services that are provided at different times when selected by the user.

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[6] Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket No. 96-45, *Report and Order*, CC Docket No. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420, 13 FCC Rcd 5318, 5474-75, para. 282 (1997).

It is possible that the "functionally separate" test previously enunciated by the Commission is intended to be resolved at least in part by reference to customer perception. Yet here too it would seem obvious that customers know when they are receiving a pure transmission path and when the provider is manipulating the content. In fact, consumers demand and expect that when they use Internet access to access website that the ISP will not change the form or content of the information provided by the third party content provider. Therefore, they correctly perceive that provision of access to websites is provision of a pure transmission path. Accordingly, under the "functionally separate" test wireline broadband Internet access is provision of both a telecommunications service and an information service.

A meaningful application of the functionally separate test should rest at least in part on an empirical or factual examination of functionalities and/or customer perceptions. However, the *NPRM* provides no such empirical or factual analysis or studies that could support the conclusion that the transmission component of wireline broadband Internet access is functionally "inextricably" intertwined with information service functions, most of the latter of which are in any event provided by the user's software or third party content providers. Therefore, the *NPRM* does not provide a basis for concluding that facilities-based wireline broadband Internet access is a unitary information service offering. Again, facilities-based wireline broadband Internet access providers offer a separate telecommunications service because they provide the facilities that constitute the transparent transmission path.

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[7] *Id.* para. 80.

3. The Transmission Component of Wireline Broadband Internet Access Should Be Classified As A Telecommunications Service in Light of Industry Trends

It has been predicted by expert industry observers that the circuit switched network will soon be replaced by a network providing all services as applications traveling over digital packet-switched facilities using IP protocol.[8] In fact, some CLECs are already doing so, which enables them to provide more service for less than what ILECs charge.[9] In this environment, all services, including voice, will be merely different software defined applications traveling over digital packetized transmission services. Moreover, there will in this environment be no meaningful distinction between the network and the Internet. Rather, the Internet will be the network. In short, the classification of all facilities-based uses of Internet access service as one seamless information service is untenable. Instead, the Commission should classify uses of packetized digital networks that do not change the form or content of the transmission as telecommunications. This will provide a consistent approach for establishing an appropriate deregulatory framework for provision of telecommunications services. As noted elsewhere in these comments, Title II in no way precludes deregulation where this is appropriate such as where the carrier lacks market power.

4. Non-Facilities Based ISPs Provide Only An Information Service

In this proceeding, the Commission is examining the appropriate statutory classification of facilities-based wireline broadband Internet access. The Commission's

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[8] The Local Exchange Network in 2015, Lawrence K. Vanstaon, Ph.D., Technology Futures, Inc. 2001.

[9] *See* Comments of Association of Local Telecommunications Services, et al, CC Docket No. 01-338, at p. 14 (April 5, 2002).

1998 *Report to Congress* examined the statutory classification of non-facilities based ISPs, and there correctly concluded that non-facilities based ISPs were exclusively providing information service.

Non-facilities-based ISPs are distinguished from wireline broadband Internet access providers by the simple fact that the former do not provide the transmission functions. Therefore, non-facilities based ISPs are never themselves providing a transparent transmission function to end users, but are always using telecommunications obtained from someone else to provide an information service to end users. Therefore, characterization of non-facilities based ISPs as providing exclusively information services is consistent with the *NPRM* and *Report to Congress* because they use, but never provide, a pure transmission path.

Further, as noted in the *Report to Congress*, under the "contamination doctrine" a non-facilities-based ISP that obtains telecommunications from other providers will be deemed to be providing exclusively an information service. As explained elsewhere in these comments, this doctrine was designed to assure that non-facilities-based ISPs would not be subject to unnecessary regulation as telecommunications carriers and to assure the continued non-regulated status of the information services marketplace. Accordingly, non-facilities-based ISPs are correctly categorized as providing only an information service.

5. The Commission Should Resolve the Statutory Classification Issue In Light of Policy Goals and Objectives

In its previous analyses and application of the statutory definitions of telecommunications and information services, and before that of the definitions of enhanced and basic services, the

Commission resolved issues in light of policy goals and objectives. The Commission established its definitions of "basic" and "enhanced" services in order to assure that information services providers would not be unnecessarily regulated as common carriers, while assuring that ILECs are not able to leverage control of the local network into control of the information services market as well.

As explained above, broadband wireline Internet access consists in part of a telecommunications service when the facilities-based provider provides a pure transmission path to the Internet. To the extent the Commission perceives any doubt on this issue, however, it should resolve the statutory classification issues raised in this proceeding in light of the serious policy issues and consequences of the possible outcomes of this proceeding.

As widely reported in press reports and elsewhere, an apparent possible outcome of this proceeding is that ILEC broadband capability would be deregulated by defining it as an information service, and removing it from Title II oversight. At the same time, the Commission in the *NPRM* indicates that it may consider eliminating *Computer Inquiry* unbundling obligations and other safeguards against discrimination.

This is an extremely alarming prospect for independent ISPs. The removal or weakening of safeguards against discrimination would permit ILECs to further extend their dominance in wireline broadband Internet access beyond the 93% of customers they already possess, and would remove the foundation for the growth and success of the Internet. This would also undermine the ability of independent ISPs to continue their long track record of being the first to provide innovative service to consumers. Such deregulatory steps would be devastating to competition, and consequently, would erode ILEC incentives to expand broadband deployment. As discussed below, classification of wireline broadband Internet access as an information

service also would threaten the long-term viability of universal service programs because under the Act only providers of telecommunications or telecommunications service fall squarely under the statutory obligation to contribute to universal service funding. Reclassification of ILEC broadband capability as an information service to any significant extent could undermine the availability of Section 251(c)(3) unbundling for CLECs because only ILEC facilities used to provide "telecommunications service" meet the definition of network elements subject to unbundling. Any of these considerations alone would warrant maintaining a framework in which ILEC broadband capability continues to be categorized as telecommunications service. Together, they present on overwhelming case that the Commission should promptly determine that it will continue to define ILECs' participation in broadband as common carriage subject to existing, or even strengthened, Title II safeguards against discrimination.

B. The Transmission Component Already Is Subject to Title II

The possibility apparently envisioned in the *NPRM* that the transmission component of wireline broadband Internet access service could be subject only to Title I is erroneous, if for no other reason, because it is already subject to Title II. While the *NPRM* purports to determine the appropriate framework for broadband wireline Internet access, the Commission already has such a framework pursuant to which LECs may offer, and are offering, broadband Internet access over their own facilities. Thus, under long standing *Computer II* rules adopted pursuant to the Commission's authority under Title II "carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and

conditions under which they provide such services to their own enhanced service operations."[10] In short, the Commission has already asserted Title II authority over the transmission component of wireline broadband Internet access. This by itself refutes any view that the transmission component of wireline broadband Internet access is subject only to Title I.

Commenters remind the Commission that for regulatory purposes under the Act, any ILEC advanced services affiliate, such as SBC's Advanced Solutions, Inc. ("SBC-ASI"), is an ILEC.[11] Therefore, SBC-ASI's telecommunications service offerings are fully subject to Title II and *Computer Inquiry* safeguards. Commenters request that the Commission reaffirm in this proceeding that SBC-ASI is fully subject to these requirements.

C. The Telecommunications Component of Wireline Broadband Internet Access Is Common Carriage Subject to Title II Under *NARUC I* and *II*

Apart from the fact that the transmission component of wireline broadband Internet access service is already subject to Title II, the traditional test for common carriage also requires that it be, and remain, subject to common carrier regulation.

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[12] The Commission's regulations define common carrier as "any person engaged in rendering communications service for hire to the public."[13] The U.S. Court of Appeals for the D.C. Circuit in *NARUC I* and *II*[14] found these

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10 *Frame Relay Order*, 10 FCC Rcd. At 13719.

11 *Association of Communications Enterprises* v. FCC, 235 F.3d 662 (D.C. Cir. 2001).

12 47 U.S.C. § 153(10).

13 47 C.F.R. § 21.2.

14 *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

rules less than fully illuminative and established a test for determining whether an activity constitutes communications common carriage. The D.C. Circuit deemed that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."[15] The key is not how large a clientele the carrier serves, but the "holding oneself out to serve the public indiscriminately."[16] This quasi-public character will either arise out of a legal compulsion to serve the public indifferently or reasons implicit in the nature of the operations to expect an indifferent holding out to the eligible user public.[17] Common carrier service is contrasted to private carriage which is "set aside for the use of particular customers, so as to not be generally available to the public."[18] Private carriage is characterized by a "clientele that might remain relatively stable, with terminations and new clients, the exception rather than the rule."[19] The carrier would desire and expect to negotiate with and select future clients on an individualized basis.[20]

The Court in *NARUC II* added a second prong to the test for common carriage, *i.e.* that customers "transmit intelligence of their own design or choosing."[21] The key consideration is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[22] Post-*NARUC I* and *II,* the Supreme Court adopted a definition of communications common carrier that adopted the D.C.

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15 *NARUC I* at 641.

16 *Id.* at 642.

17 *Id.*

18 *Id.*

19 *Id.* at 643.

20 *Id.*

21 *NARUC II* at 609.

Circuit's approach. The Supreme Court defined a communications common carrier as a carrier "that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[23]

Applying these principles to the transmission component of facilities-based wireline broadband Internet access service leads to the inescapable conclusion that it is a common carrier offering subject to Title II, which, as noted, is already the case in any event. The legal compulsion to serve part of the *NARUC I* test is met by the current regulatory requirement that LECs may provide information services, including Internet access, as customers of their own tariffed offering of the transmission service.

Moreover, even if the *Computer III* legal compulsion to provide the underlying transmission service on a common carrier basis did not exist, the offering of the underlying transmission service meets the test for common carriage because LECs are offering to provide the telecommunications portion of the service indiscriminately to the public at large. ILECs do not deal on an individual basis with millions of consumers. Instead, they undertake to provide service to all on the same terms and conditions. Indeed, it is the only way ILECs could provide mass services. As discussed previously, the transmission component of self-provisioned wireline broadband Internet access is a separate offering to provide a pure transmission path for access to content on the Internet, and users expect and use it as such, even though they may also choose at times to receive more functions from the provider, in which case the provider uses the

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22 *Id.* at 610.

23 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

telecommunications component to provide an information service. Therefore, the transmission component of facilities-based wireline broadband Internet access is a common carrier offering under *NARUC I*.

It is important to note that the D.C. Circuit in *NARUC I* limited the FCC's discretion to apply, or not apply, common carrier status. The Court held:

> Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus, we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers.[24]

Thus, the Commission may not, for example, refrain from applying Title II based on the misguided view that this would promote deployment of broadband.[25] Rather, the transmission component of wireline broadband Internet access is fully subject to regulation as common carriage under *NARUC I*.

D. ILECs' Possession of Market Power in the Wireline Broadband Marketplace Requires Application of Title II

While dominant carrier status is not a precondition for application of Title II, it nonetheless fully justifies assertion of Title II jurisdiction. Commenters are confident, based on

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[24] *NARUC I* at 644.

[25] The Court did intimate, however, that while the Commission has little discretion in defining what should be a common carrier service, it may have some discretion to refuse to exercise its common carrier regulatory powers. *NARUC II* at 620. Thus, as discussed elsewhere in these comments insofar as the Commission chooses to deregulate ILEC provision of broadband, it may do so under Title II.

the record established in the *Non-Dom Proceeding*,[26] that the Commission will conclude that ILECs are dominant in provision of wireline broadband common carriage. This dominance is attributable to the fact that only ILECs possess the ubiquitous loops and transport facilities necessary to reach consumers and businesses. This gives them the ability, absent regulatory safeguards, to leverage control of these bottleneck facilities into control of the information services marketplace, as the Commission has long recognized. Thus, absent regulation, ILECs can engage in systematic discrimination against ISPs, and, as discussed herein, are continually attempting to do so even under current safeguards.

The Commission in its proceeding addressing the proper regulatory treatment of ILEC broadband services has recognized that ILECs continue to have market power with respect to basic local exchange service, and that broadband services are provided over the same local exchange and exchange access facilities.[27] Thus, ILECs' demonstrated ability to provide a broadband capability stems in part from their ability to piggy-back the construction of broadband facilities upon the core voice telephone network.[28] This gives the ILECs a significant economic advantage of integration that is unavailable to competing, non-integrated providers. Inevitably, they will be able to leverage this integration in a manner that effectively excludes competing information service providers ("ISPs) from significant segments of the market, and they are doing so today. As economists Robert Hall and William Lehr argue:

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[26] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("*Non-Dom Proceeding*").

[27] *Id.*, para. 6. As Chairman Powell notes in his separate statement ILECs remain "clearly dominant" in local exchange service. *Id.* Separate Statement of Chairman Michael Powell at 1.

[28] For instance, Project Pronto, which SBC is using to spur deployment of broadband services, is an overlay of the existing SBC voice network meaning it will not displace existing network facilities.

> But the on-ramps to the information highway remain in the hands of the monopolists. The last mile of the telecom network lacks the competition that has invigorated the rest of the network. The last mile remains in the hands of the traditional phone companies, the Bells. Bell control of the last mile means that continuing regulation is essential. Because homeowners and small businesses rarely have ways to gain access to the telecom network apart from the Bells' last mile connections, the Bells could extract full monopoly value of the network if they were not regulated. As competitive service providers add value to telecom products, the Bells would absorb that value through higher prices for the last mile, and consumers would be denied the benefit of added value.[29]

The ILECs' overwhelming market share in the wireline broadband market is shown by the fact that out of the 2.7 million high-speed DSL lines, about 93% of these lines were reported by incumbent local exchange carriers (LECs); about 86% of these lines were reported by the Regional Bell Operating Companies (RBOCs); and about 7% of these lines were reported by non-ILECs.[30] ILEC DSL customer growth rates are now fast outstripping CLEC customer growth rates.[31] If ILECs are freed from their common carrier obligations to provide service on demand,[32]at tariffed rates that are just and reasonable,[33] without unreasonable discrimination,[34] and if ILECs are freed from their interconnection and unbundling obligations in regard to facilities used to provide information services,[35] then the ILECs will be able to drive competitors that rely on their facilities out of the market, which is their objective. Accordingly, ILECs'

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29 Robert E. Hall and William H. Lehr, *Promoting Broadband Investment and Avoiding Monopoly,* at 3 (Feb. 21, 2002).

30 *FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability*, FCC Press Release (Feb. 6, 2002).

31 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, Third Report at para. 51 (Feb. 6, 2002).

32 47 U.S.C. § 201(a).

33 47 U.S.C. § 203; § 201(b).

34 47 U.S.C. § 202.

35 47 U.S.C. §§ 251, 252.

dominance in the wireline broadband marketplace fully justifies the continuation of Title II authority over the transmission capability of facilities-based broadband wireline Internet access.

E. The "Contamination Doctrine" Does Not Apply to Facilities-Based Providers

As noted, the "contamination doctrine" does not apply to facilities-based carriers. The Commission when formulating its *Computer II* and *III* rules rejected the application of the contamination doctrine to basic and enhanced services provided by facilities-based dominant carriers such as the RBOCs. Under this approach, a combination of basic and enhanced service could be treated in its entirety as a unitary unregulated enhanced service.[36] Under a contamination theory, when a common carrier transmission service is combined with an information service and provided to an end user as a single information service, the information service "contaminates" the communication service and removes it from common carrier regulation.[37] The Commission recognized that if it applied this doctrine to facilities-based carriers, at some point conventional exchange service also would become unregulated because it would be contaminated with the enhanced service of protocol conversion.[38] The Commission noted that this would be an "improper policy result if exchange service remains, as it is now, a near monopoly otherwise warranting regulation."[39] The Commission noted that applying the contamination doctrine to carriers that lacked market power, did not have underlying facilities, and purchased transmission capacity from other parties via tariff would not be sensible since no

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[36] *Amendment of Section 64.702 of the Commission's Rules*, Notice of Proposed Rulemaking, CC Docket No. 85-229, Third Computer Inquiry, 50 FR 33581, para. 32 (1985).

[37] Reply Comments of EarthLink, Inc., GN Docket No. 00-185, at 31 (Jan. 31, 2001) *citing Frame Relay Order*, 10 FCC Rcd. 13719.

[38] *Id.*

[39] *Id.*

policy goal is served by regulating any aspect of these entities' offerings.[40] For carriers with market power, the Commission noted:

> Conversely, the offerings of dominant carriers are often monopoly or near-monopoly ones. Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals. We propose below to develop policies that apply such a dominant/non-dominant entity split.[41]

Since ILECs remain dominant in provision of wireline broadband services and competitors remain virtually exclusively reliant on ILECs for transmission capacity, the Commission should continue to reject the application of the contamination doctrine to ILECs and to separately regulate the transmission component of Internet access service that ILECs provide over their own facilities.[42]

III. TITLE II PROVIDES THE BEST BASIS TO ESTABLISH DEREGULATION WHILE MAINTAINING APPROPRIATE SAFEGUARDS

A. The Commission May Not Have Adequate Authority Under Title I, Or Over "Private Carriage," To Establish Adequate Safeguards for ILEC Participation in the Broadband Information Services Market

The Commission seeks comment on the possibility of applying a "minimal regulatory Title I regime" to wireline broadband Internet access services and the implications this would

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40 *Id.* at para. 46, n. 34.

41 *Id.*

42 SBC on its website states that it is working on enabling access for consumers to an "integrated package of broadband access, premium data and Internet services and telephony." http://www.sbc.com/data_capabilities/0,5931,1,00.html SBC also notes that it will "Network your PCs and Internet devices using existing telephone wires - no new wiring required." http://www.swbell.com/content/0,3854,7,00.html Under the contamination doctrine, the telephony aspect would escape regulation because it would be bundled with the information service offerings. To avoid prematurely deregulating ILECs, the Commission should, therefore, continue to decline to apply the contamination doctrine to facilities-based LECs with market power

have on nondiscriminatory access objectives.[43] For the reasons stated in these comments the Commission should retain Title II jurisdiction over the transmission component of wireline broadband Internet access service. If the Commission nonetheless chose not to do so, Commenters would work actively with the Commission to fashion appropriate safeguards against discrimination pursuant to the Commission's authority under Title I.

However, the Commission should seriously question whether it would have sufficient authority under Title I to fashion adequate safeguards. Title I identifies the various subject matters over which the Commission may exercise authority pursuant to other Titles in the Act. The Commission has stated:

> Section 1 of the Communications Act established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States ... adequate facilities at reasonable charges ...." Similarly, Section 2 gives us jurisdiction over "all interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication ..." Finally, Section 3 defines "communication by wire" and "communication by radio" as including "the transmission ... of writing, signs, signals, pictures and sounds of all kinds ... including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[44]

However, identification of this subject matter is not an independent source of authority. As the Ninth Circuit has held:

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. *See United States v. Southwestern Cable Co.,* 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) (FCC's Title I power "restricted to

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43 *NPRM* at paras. 16, 50.

44 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations By Time Warner Inc. and America Online Inc., Transferors, to AOL Time Warner, Inc., Transferee,* CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12, para. 148 (2001).

> that reasonably ancillary to the effective performance of the Commission's various responsibilities"). In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services. *See CCIA v. FCC,* 693 F.2d 198, 213 (D.C.Cir.1982) (upholding FCC regulation of enhanced services as ancillary to Commission's authority over interstate basic telephone services); *GTE Serv. Corp. v. FCC,* 474 F.2d 724, 731 (2d Cir.1973) (same).[45]

Obviously, ancillary authority under Title I does not provide the same degree of authority as direct authority under Title II. Moreover, for the Commission to exercise Title I jurisdiction over Internet access it would need to be ancillary to its Title II jurisdiction over common carrier services. If, however, the Commission finds no common carrier component to wireline broadband Internet access service, it may undercut the basis of its ancillary jurisdiction. Therefore, it is not clear on its face to what extent the Commission could exercise any affirmative authority over wireline broadband Internet access under Title I.

Further, the Commission has not heretofore established a comprehensive scheme of regulation under Title I. Thus, the Commission has not chosen heretofore to impose any regulation of information services under Title I. ILECs are currently free to discriminate in provision of services subject only to Title I such as billing and collection services[46] and voice mail service. In fact, the Commission's affirmative exercise of Title I jurisdiction has mainly been limited to preempting state regulation. For instance, when the Commission detariffed ILEC provisioning of inside wiring, it also used its Title I jurisdiction to preempt states from tariffing

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45 *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) ("*California I*").

46 *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150 (1986).

the service.[47] Likewise in *Computer III*, the Commission attempted to preempt nearly all state regulation of enhanced services

As noted above, the Commission describes Title I as a "minimal . . . regulatory regime." The Commission has recognized the limitations of its Title I jurisdiction by noting in regard to ILEC validation and screening services for calling cards that "regulation of these services under Title I ancillary jurisdiction, as suggested by some of the LECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and non-discriminatory terms and conditions."[48] Accordingly, the Commission opted for Title II regulation of those services.[49]

For these reasons, Commenters question whether the Commission could fashion under Title I the adequate safeguards it may be contemplating. The Commission asks that if it requires access to ILEC transmission services for Internet access how such access should be priced.[50] There is nothing in the Commission's current Title I precedent that would clearly support such standards.

Accordingly, the Commission should retain Title II regulation over the transmission component of wireline broadband Internet access in order to be assured that it will have adequate authority to maintain necessary safeguards against discrimination.

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47 *Promotion of Competitive Networks In Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, para. 56 (1999).

48 *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, FCC 92-168, para. 25 (1992).

49 *Id.*

50 *NPRM* at ¶ 50.

B. "Private Carriage" Does Not Provide An Adequate Basis for Regulation

The Commission also seeks comment on possible regulation of facilities-based wireline broadband Internet access as private carriage or by oversight of contracts. This is inappropriate first of all because wireline broadband Internet access service does not constitute private carriage. As discussed above in Section II.C, ILECs offer service to end users and to the hundreds of ISPs in their regions on a public offering basis, and this is the only practical way for them to do so. ILECs do not determine with each customer on an individual basis on what terms to provide service, nor would they even if completely deregulated. Therefore, the Commission must reject the private carriage approach to regulation of broadband wireline Internet access.

Nor would an effort to regulate individual contracts be feasible. As noted, ILECs are not able to offer service on an individualized basis to millions of consumers or hundreds of ISPs. And, the contract approach would also be particularly cumbersome for the Commission and all concerned even if ILECs were likely to use individual contracts. Under the *Sierra Mobile* doctrine, an agency may modify a private contract that may "cast upon other consumers an excessive burden," but the contract modification can only follow investigation and a determination that the contract was unjust, unreasonable, unduly discriminatory or preferential.[51] Thus, unlike under Section 204(a) where the Commission can suspend a tariff and investigate, the private contract would continue in force until the Commission concluded its investigation.

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[51] *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The doctrine has been applied to the FCC. *See Bell Tel. Co. of Pa. V. FCC*, 503 F.2d 1250, 1275-1282 (3d Cir. 1974).

Moreover, the Commission may only modify the contract, when the contract's terms "adversely affect the public interest."[52] As the Commission has noted:

> The threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the Sierra-Mobile doctrine is much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act. Thus, a carrier cannot obtain the remedy of contract reformation by showing only that the contract requires it to pay an unduly high price for communications services. Such private economic harm, standing alone, lacks the substantial and clear detriment to the public interest required by the Sierra-Mobile doctrine.

Accordingly, a private carriage or contract approach to regulation of the transmission component of broadband wireline Internet access service would be unsatisfactory because it would impose undue burdens on regulators and, in any event, provides insufficient assurance of reasonable terms and conditions of service.

C. The Commission May Deregulate Under Title II

While Title II provides adequate authority for safeguards, it is also permits deregulation where appropriate. Title II sets forth a full spectrum of powers and authority for the Commission, but there is nothing that requires the Commission to apply the full scope of its authority under Title II. Thus, as is well known, "non-dominant" carriers are subject to Title II but subject only to minimal specific requirements, while "dominant" carriers appropriately remain subject to more extensive oversight.[53] To name only one specific example of deregulation under Title II, the Commission has allowed television licensees to broadcast

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[52] *IDB Mobile Communications, Inc. v. Comsat Corporation*, File No. E-97-48, Memorandum Opinion and Order, FCC 01-173, para. 15 (2001).

[53] *Federal Telecommunications Law* at § 3.11. This is not to say that the solution is to classify the ILECs as non-dominant in the provision of broadband services. The record in CC Docket No. 01-337 establishes that such a reclassification is not warranted at this time. When conditions in the marketplace change such that ILECs are "non-dominant," then the Commission can adjust Title II obligations as warranted.

electronic newspapers, data, computer software, and paging services transmitted in the interstices of television bands without being subject to traditional Title II requirements even though it deemed such services to be common carrier services.[54] Section 160 of the Act has given the Commission even more flexibility by allowing it to forbear from applying provisions of the Communications Act, save for interconnection and Section 271 provisions, if certain conditions are met.[55] Therefore, the Commission has ample flexibility under Title II to respond to marketplace conditions. There is no need to apply Title I regulation in order to do so.

IV. THE COMMISSION SHOULD RETAIN *COMPUTER III* SAFEGUARDS INCLUDING THE REQUIREMENT THAT LECS SEPARATELY OFFER THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE

A. Contrary to the Suggestion in the *NPRM*, *Computer Inquiry* Safeguards Are Not Obsolete In a Broadband Environment

In the *NPRM*, the Commission seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for facilities-based wireline broadband internet access services.[56] The Commission suggests that these requirements may not apply to broadband access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and market circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and other narrowband applications," rather than broadband services.[57] Contrary to the Commission's

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54 *Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations,* Report and Order, 101 F.C.C.2d 973, paras. 13-21 (1984).

55 47 U.S.C. § 160.

56 *NPRM* at para. 43.

57 *Id.* at paras. 31, 35.

suggestion, however, the safeguards established in the *Computer Inquiry* proceedings are equally applicable to, and necessary for, broadband Internet access services. The information services market has evolved tremendously since the creation of the basic/enhanced services dichotomy, but as is evident in the Commission's *Computer Inquiry* proceedings, the *Computer Inquiry* safeguards were designed to accommodate new and emerging technologies, including broadband services. Moreover, the legal, technological and market factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the broadband services market. Thus, at a minimum, the existing *Computer Inquiry* safeguards must remain in place for broadband access services.

In its *NPRM*, the Commission suggests that because the technological characteristics of broadband internet access services did not exist at the time of the initial *Computer Inquiry* proceedings, the policies and requirements implemented in those proceedings may not apply to broadband internet access services. The Commission indicates that such safeguards should be limited to narrowband technologies.[58] While it is true that there have been tremendous technological advances associated with the provision of enhanced services, the Commission recognized and took into consideration future technological advances for both basic and enhanced services when it established its basic and enhanced regulatory regime and corresponding safeguards.[59]

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[58] *Id.* at paras. 36-37.

[59] *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Final Decision and Order,* 28 F.C.C.2d, 268-69 (1971) *("Computer I")* (finding that data processing will be a major force in the economy "in both absolute and relative terms in the years ahead"); *see also See Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision,* 77 F.C.C.2d 384, 425 (1980) ("Computer II")(where the Commission refused to classify different categories of

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing plain old telephone services and that technological evolution allowed the provision of computer and data processing (enhanced) services over these networks.[60] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services from the rapidly evolving enhanced services;[61] finding separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[62]

The Commission's establishment of the basic/enhanced dichotomy evolved from advances in microprocessor technology that permitted data to be processed outside of a central location and at intermediate locations or even within customer premises equipment ("CPE").[63] "Distributed processing," as it is known, refers to a network of computers in which data

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enhanced services because in "a market as vibrant as enhanced services" such a distinction "may miss important new developments").

60 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 7 F.C.C.2d 11 (1966) ("*Computer I NOI*").

61 The Commission defined basic service as "the common carrier offering of transmission capacity for the movement of information," including, analog or digital transport of voice, data and video. *Id.* at 419. The Commission held that basic services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. The Commission defined "enhanced service" as a service that "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Federal State Joint Board on Universal Service, Report to Congress*, 13 Commission Rcd 111501, 11516-17, 11520, 11524 (1998).

62 *Computer II,* 77 F.C.C.2d 384.

63 *Computer II* at 391-93.

processing is frequently initiated on local computers and then sent over the network. and is the fundamental basis for the establishment of the basic transmission service classification in *Computer II.* In that proceeding, the Commission made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[64] The Commission recognized that basic service can be offered utilizing different bandwidths, as well as different analog and digital capabilities.[65] The Commission also stated that "[u]se internal to the carrier's facility of communications techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. *that facilitate economical, reliable movement of information does not alter the nature of the basic services.*"[66] Thus, the Commission's establishment of the basic services classification and associated regulation took into account the future technological potential of such services. Indeed "distributed processing" directly foreshadowed the Internet.

The Commission also took into consideration the potential evolution of enhanced services. Indeed, the rapid evolution of technology in the enhanced services market was a key factor in the Commission's establishment of the basic/enhanced services dichotomy.[67] Finding that the market for enhanced services was effectively competitive and seeking to promote and foster this competition, the Commission held that enhanced services should not be subject to

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64 *Id.* at 420.

65 *Id.* at 419.

66 *Id.* at 420.

67 *See Computer II*, 77 F.C.C.2d at 433.

Title II common carrier regulation.[68] The Commission found that such services would "flourish best" in a competitive market and would provide the public with "a wider range of existing and new data processing services."[69] The Commission found that its decision in *Computer I* to forgo regulation of data processing was "largely accurate" and "[i]f anything, it was overly conservative as to the extent to which market applications of computer processing technology would evolve."[70] The Commission confirmed its finding that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[71] The Commission also noted that "the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable."[72] Thus, it is clear that when the Commission established the basic/enhanced services distinction consideration of future technologies and services was a key component to its analysis.

Moreover, the key *Computer Inquiry* safeguards, such as the unbundled offering of basic service, are not technology specific. They can, and do currently, apply equally to narrowband and broadband services. There is nothing in the key *Computer III* safeguards of framework that suggests they were intended only for the narrowband network.

Accordingly, the policies and safeguards established in the basic/enhanced services regulatory regime also apply to future technologies and services. Throughout the history of the *Computer Inquiry* proceedings, the primary purpose of this dichotomy and the need for the

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68 *Id.* at 423-33.

69 *Id.* at 433.

70 *Id.*

71 *Id.* at 434.

safeguards has been to address the reliance of the enhanced services on basic transmission services.[73] The Commission found that "enhanced services are dependent upon the common carrier offering of basic services and that a basic service is the 'building block' upon which enhanced services are offered."[74] The Commission consistently has determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing enhanced service providers that seek to purchase the underlying transmission capacity from the dominant carriers.[75] Thus, to protect the competitive nature of enhanced services, the Commission retained Title II common carrier regulation of the basic transmission services used to provide these services.[76] In this connection, commenters stress that existing DS1 services, although constituting broadband, are clearly telecommunications services. Thus, the Commission can. and should, apply Title II regulation to ILECs' broadband capability.

Based on these fundamental principles, the Commission has placed restrictions on facilities-based carriers providing both basic and enhanced services. Specifically, the Commission requires carriers that "own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they

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72 *Id.* at 422.

73 *Computer I*, 28 F.C.C. at 269; *see also Computer II*, 77 F.C.C.2d 384; and *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*").

74 *Id.*

75 *See In Re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 Commission Rcd. 7418, 7420 (2001)("*CPE/Enhanced Services Unbundling Order*").

76 *Id.* at 428.

provide such services to their own enhanced service operations."[77] The Commission also has imposed additional safeguards on the BOCs, including the Comparably Efficient Interconnection (CEI), Open Network Architecture (ONA), cost allocation and network disclosure requirements.[78]

Changes in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services, but broadband providers still rely on basic transmission services interconnected with the telecommunications network to provide these broadband services. Indeed, the Commission has continued to apply the *Computer Inquiry* safeguards to new technologies, including high-speed, packet-switching services.[79] As the Commission found in its *Frame Relay Order*, treating the high-speed, packet-switching frame relay service as a basic service "provides competitive access to the underlying basic service of facilities-based carriers who are often better able to implement new communications technologies. This access allows competing enhanced service providers to more easily enter and compete in the market for such technologies."[80] Although during the course of the Commission's *Computer Inquiry* proceedings the Commission has modified the level of restrictions governing

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77 *CPE/Enhanced Services Unbundling Order*, 16 Commission Rcd. at 7421 (citing *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 10 Commission Rcd. 13717, 13719 (1995) ("*Frame Relay Order*"); and *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 10 Commission Rcd. 4562, 4580 (1995).

78 Finding that the section 251(c)(5) network disclosure rules of the 1996 Act were as comprehensive, if not more so, than the *Computer III* disclosure rules, the Commission eliminated the latter rules. *Computer III Further Remand Order*, 14 Commission Rcd. at 4316-17. The BOCs also are subject to the Commission's cost-accounting rules to prevent cross-subsidization between the regulated transmission services and the unregulated enhanced services. See 47 C.F.R. Parts 31, 43, 67 and 69.

79 *See Frame Relay Order*, 10 Commission Rcd. 13,717.

80 *Id.* at 13722.

the provision of basic and enhanced services,[81] it has not eliminated the requirement that the basic transmission component be separated from the enhanced service. In addition, after over 30 years of addressing this issue, and even more significantly, post-1996 Act, the Commission, in a decision released only a year ago, found that the underlying transmission service used to provide information services is still a critical input for enhanced service providers,[82] and currently is applying these safeguards to the BOCs' provision of broadband services.[83]

The Commission's own *Computer Inquiry* policies recognize that technological distinctions in services are irrelevant to basic/enhanced services regulation if dominant control over the facilities essential to provide these services still exists. As discussed herein,[84] the BOCs still are dominant in the local exchange market and still control essential bottleneck facilities used to provide broadband services. Thus, the fundamental principles of dominant control over transmission facilities and the potential for discrimination that served as the basis for the establishment of the *Computer Inquiry* policies and safeguards[85]still apply today and require that these anti-discrimination safeguards remain in place for broadband access services.

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81 In its *Computer II* proceeding, the Commission required the dominant Bell Operating Companies to establish a separate subsidiary for the provision of enhanced services, which was required to purchase its transmission capacity from the parent company's tariff. *Computer II*, 77 F.C.C.2d 384. In its *Computer III* proceeding, the Commission eliminated the separate subsidiary requirement and replaced it with non-structural safeguards including the Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) requirements. *Computer III, Phase I Order*, 104 F.C.C.2d 958. Currently the BOC are permitted to provide bundled basic and enhanced services, but only subject to the restrictions and safeguards associated with providing these services, including non-discriminatory access to the underlying transmission services.

82 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd at 7442. So much so, that the Commission imposes the same separation requirements on non-dominant carriers. *Id.* at 7442-43.

83 *Id.* at 7425.

84 *Supra* II.D.

85 *See Computer II*, 77 F.C.C.2d at 422 (noting that as "the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively").

The *NPRM* also cites the pro-competitive and deregulatory policies of the 1996 Act that are aimed at the development of the Internet and deployment of advanced services, suggesting that the statutory mandates may be different than those considered in the *Computer Inquiry* proceedings.[86] Contrary to the Commission's suggestion, however, the statutory mandate underlying the *Computer Inquiry* policies is consistent with the statutory mandate governing broadband access services. As the basis for its *Computer Inquiry* rules, the Commission cites to its mandate pursuant to section 151 of the Act "to make available 'to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .'"[87] In its *NPRM*, the Commission cites to the statutory mandate of section 706 to encourage "'the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .'" as the basis for its regulation of broadband access services.[88] As is evident in the language of both of these provisions, the Commission's goal under both statutory provisions is similar—to establish rules and policies that will make communications and advanced telecommunications available to all Americans. Thus, it follows that the Commission's pro-competitive policies governing enhanced services in the *Computer Inquiry* proceedings are consistent with the pro-competitive policies set forth in the 1996 Act. Indeed, nearly 30 years ago, the Commission found the enhanced services market truly competitive, stating that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive

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86 *NPRM* para. 35, n. 69.

87 *Computer I*, 28 F.C.C.2d at 268 (citing 47 U.S.C. § 151).

88 *NPRM* at n.69 (citing 47 U.S.C. § 157).

market."[89] At the same time, however, the Commission recognized that the transmission component underlying the provision of enhanced services was owned and controlled by dominant carriers seeking to compete directly with the enhanced service providers—a critical factor that had the potential to threaten this competitive market.[90] As is evident herein, this same concern exists in the broadband access services market today, and thus, the same policies must apply.

Throughout the current history of the *Computer Inquiry* proceedings, the Commission has adapted its regulations to the changes in the enhanced services market and modified its restrictions and safeguards, accordingly. But, the Commission has always found, even as recent as a year ago, that the continued dominance of the ILECs in the local market warrants the retention of the *Computer Inquiry* safeguards.[91] The status of market conditions for broadband Internet access services has not changed so dramatically in the last year to justify such a radical departure in the Commission's regulations aimed at protecting ISPs from discrimination. It is significant to note, in assessing the impact of the pro-competitive requirements of the 1996 Act on the *Computer Inquiry* safeguards, the Commission stated that "[a]lthough many ISPs compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a BOC, to reach its customers. Although . . . under the 1996 Act, the BOCs are subject to additional statutory requirements, such as the section 251 unbundling and

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89 *Computer II*, 77 F.C.C.2d at 433-34.

90 *Id.* at 475.

91 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd at 7442.

the network information disclosure requirements . . . we cannot yet conclude that the pro-competitive goals of the 1996 Act have been fully reached."[92]

In sum, there is nothing about wireline broadband Internet access services that justifies exempting these services from the fundamental principles governing common carrier regulation and protection against discrimination and anticompetitive behavior that lay at the heart of the *Computer Inquiry* policies and safeguards. Indeed, as demonstrated herein, these principles are critical to promoting competition in the broadband access market. Information service providers must compete with dominant ILECs in the provision of broadband Internet access services. The ILECs still are dominant carriers in the local exchange and exchange access markets and have an incentive to discriminate against their competitors in the provision of broadband access services. Non-facilities-based ISPs still rely on the ILECs for the transmission capacity used to transmit their broadband access services to their customers and this transmission capacity remains the critical input for the provision of these services. Thus, there is no legal, regulatory, or market distinction that supports the elimination of the *Computer Inquiry* safeguards with respect to broadband access services.

B. Sections 201 and 202 Ensure That Access to Underlying Transmission Capacity for Information Services is Provided Under Just and Reasonable Rates and on a Non-Discriminatory Basis

If the transmission component of wireline broadband Internet access is not regulated as telecommunications service under Title II of the Act, providers of broadband access services will lose the critical protections of sections 201 and 202. As the Commission notes in its *NPRM*,

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[92] *See In Re Computer III Further Remand Proceedings*, 14 Commission Rcd. 4289, 4301 (1999) ("*Computer*

ISPs currently purchase the transmission needed for their broadband services from tariffs.[93] The terms and conditions of these tariffed services are governed by the just and reasonable and non-discriminatory mandates of sections 201 and 202 of the Act. If the provision of transport services necessary to provide broadband access services are no longer subject to these Title II requirements, then dominant carriers that provide competing broadband access services, while also controlling the underlying transmission capacity, will be free to discriminate against their broadband access competitors.

Section 201(b) requires that the rates, terms, and conditions of providing such services be just and reasonable.[94] In addition, Section 202(a) of the Act, makes it unlawful for any common carrier to impose unjust or unreasonable discrimination for rates, terms, conditions, facilities or services in connection with like communication services.[95] Sections 201(b) and 202 were cited by the Commission in its *Computer Inquiry* proceedings as primary safeguards for ensuring that ISPs obtain transmission services on nondiscriminatory terms and conditions. Specifically, the Commission emphasized that all carriers, including dominant and non-dominant carriers have a "firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."[96] The Commission also noted that section 201(b) prohibits discrimination in rates, terms or conditions

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III Further Remand") (refusing to remove the safeguards established to protect ISPs from discriminatory treatment).

93 *NPRM* at para. 50.

94 47 U.S.C. § 201(b).

95 47 U.S.C. § 202(a).

96 *CPE/Enhanced Services Unbundling Order* at para. 46.

that would favor the carrier itself, over a competing enhanced service provider.[97] In citing these statutory safeguards, the Commission sought to reassure ISPs that they would have non-discriminatory access to the transmission services they needed to provide their information services.[98] If the underlying transport for broadband Internet access services is not regulated as a Title II common carrier service, these protections against discrimination will not be applicable. As explained above, the concerns underlying the Commission's findings in the *Computer Inquiry* proceedings have not changed and are equally valid today. Accordingly, it is essential that the underlying transmission component of broadband access services be classified as telecommunications services and be subject to Title II common carrier regulation.

C. *Computer Inquiry* Safeguards Create the Right Incentives for Deployment of Broadband

In its *NPRM*, the Commission seeks comment on the impact of the *Computer Inquiry* requirements on the deployment of broadband internet access services.[99] As explained below, it is not necessary for the Commission to remove these safeguards in order to encourage further deployment of these broadband services. To the contrary, if the Commission were to eliminate these safeguards, it would have a detrimental impact on the deployment of broadband services.

As the Commission recently found, the deployment of advanced services to all Americans is proceeding in a "timely and reasonable manner," and the advanced services market

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97 *Id.*

98 *Id.*

99 *NPRM* at para. 52.

"continues to grow."[100] This growth is occurring even with the current *Computer Inquiry* safeguards in place.[101] Facilities-based CLECs entering the market are investing in and constructing fiber optic networks designed to meet the high-speed data needs of today's consumers. In response to this competitive challenge, the ILECs also have been investing in, and upgrading, their networks for the provision of advanced high-speed services despite the common carrier regulations imposed on the provision of their services.[102]

However, competition best creates the incentive to invest in and deploy advanced technologies. In its reports on the status of the deployment of advanced telecommunications the Commission has stated, "'competition, not regulation, holds the key to stimulating further deployment.'" [103] The Commission also recognized that "there may be important legal, policy, technological, or other differences among classes of providers that require disparate regulatory treatment of such providers."[104] Thus, it is regulatory requirements, such as the *Computer Inquiry* safeguards, that protect and promote this competition, recognizing that the dominant position of the ILECs requires special regulatory treatment. Without these safeguards, competition in the broadband market will be stymied and the ILECs will no longer have an incentive to invest in these advanced technologies. Indeed, in its *Frame Relay Order*, the Commission found that "under the *Computer II* and *Computer III* decisions, competitive access

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100 *See In Re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Third Report*, CC Docket No. 98-146, Commission 02-33 (rel. Feb. 6, 2002); *see also infra* VII.A.

101 *See infra* VII.A.

102 *See infra* at p. 58.

103 *Advanced Telecommunications Third Report* at para. 133 (citing *Advanced Telecommunications Second Report*, 15 FCC Rcd. at 21004).

104 *Id.*

has promoted the public interest by accelerating the deployment of emerging technologies such as frame relay."[105] For these reasons, the *Computer Inquiry* safeguards create the correct incentive to promote competition in the broadband internet access services market, and thereby, continued deployment of wireline broadband capability.

D. Performance Standards and Section 271 Compliance Are Not Adequate Substitutes for *Computer Inquiry* Safeguards

In its *NPRM*, the Commission seeks comment on whether the assessment of certain performance standards on the BOCs' provision of narrowband services would be sufficient to forgo the imposition of the *Computer Inquiry* safeguards on the BOCs' provision of broadband services.[106] The Commission also seeks comment on whether section 271 compliance for entry into the long distance market would be an adequate substitute for the *Computer Inquiry* safeguards in the BOCs' provision of broadband services.[107] Neither the imposition of performance standards, nor compliance with the section 271 requirements is a sufficient substitute for the *Computer Inquiry* safeguards, which are necessary to protect ISPs against discrimination by the BOCs in the provision of broadband access services.

The Commission's suggestion that the *Computer Inquiry* requirements may be unnecessary for the BOCs' broadband services if the BOCs are achieving certain performance levels with respect to its narrowband services, starts with the erroneous presumption that there should, or could, be disparate regulatory treatment for BOCs' narrowband and broadband

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105 *Frame Relay Order*, 10 Commission Rcd. at 13722.

106 *NPRM* at para. 48.

107 *Id.*

services. As explained herein,[108] there is no legal, technical or market-related distinction that would warrant the elimination of the *Computer Inquiry* safeguards with respect to the BOCs' provision of wireline broadband Internet access services. Moreover, assessing the BOCs' performance levels in the delivery of non-broadband services is irrelevant to whether the safeguards are necessary to protect the broadband ISPs from discrimination with respect to the BOCs' delivery of competing broadband services over bottleneck facilities. Simply because a BOC is meeting minimum performance standards in its provision of narrowband services does not mean that the BOC is not engaging in systematic discrimination against ISPs in provision of broadband services. This is especially true if there are no safeguards in place to protect competing broadband providers against discrimination from BOCs that control facilities used to provide competing broadband services. However, broadband performance standards could be useful in supplementing existing *Computer III* safeguards, and the Commission should consider adopting them.

Section 271 requirements also are not an adequate substitute for *Computer Inquiry* safeguards because they do not address the specific concerns underlying the need for the safeguards. They are also only applicable to BOCs that choose to provide long distance service. Moreover, the Section 271 14-point competitive checklist focuses on interconnection and access to the BOC's network facilities, including access to UNEs and unbundled local loop by CLECs.[109] Thus, Section 271 requirements fail to ensure that ISPs will be granted non-discriminatory access to the basic transmission services necessary to provide their broadband

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108 *Supra* IV.A.

109 *Id.*

services.[110] In particular, Section 271 does not specifically require the BOCs providing bundled basic and information services to separate the basic transmission services underlying the provision of broadband services and to make this transmission service available to competing broadband service providers. Applying the *Computer Inquiry* safeguards to broadband internet access services, however, would ensure such non-discriminatory access.[111]

Moreover, even with respect to CLECs, under Section 271 the BOCs need only meet a minimum level of performance and that performance is assessed on the "totality of the circumstances."[112] Such an assessment provides no guarantee that a BOC has met the required performance level with respect to all competitive carriers seeking access to its network facilities or even with respect to each element on the 14-point checklist. Moreover, there is no guarantee that a BOC will maintain those performance levels after a BOC's section 271 application is approved. Indeed, Verizon paid $3.5 million in Performance Assurance Plan penalties for December 2000 and $3.8 million for January 2001 for failure to meet post-review performance standards.[113] Thus, BOC compliance with the section 271 requirements is an inadequate substitute for the *Computer Inquiry* safeguards.

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110 As noted above, *supra* p.36, in a recent *Computer Inquiry* decision, the Commission found that notwithstanding the additional regulatory protections put in place by the 1996 Act, the *Computer Inquiry* safeguards were still necessary to protect enhanced service providers from discrimination.

111 *See supra* pp. 40-41.

112 *See In Re Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for the Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* 16 FCC Rcd. 6237, para. 29 (2001).

113 *See* Verizon New York PAP/CCAP Market Adjustment summary, December 2000 and January 2001. http://238.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm

E. Intermodal Competition Is Irrelevant to the Need for ILEC Safeguards

In the *NPRM*, the Commission states that the "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which ISPs can obtain access to customers."[114] The Commission suggests that the *Computer Inquiry* safeguards may no longer be necessary to protect ISPs from discrimination because there are other network platforms, such as cable, wireless and satellite, over which customers can access broadband services.[115] Contrary to the Commission's suggestion, however, intermodal competition, such as it is, does not obviate the need for *Computer Inquiry* safeguards.

While some *end-user customers* may have access to a variety of different platforms for receiving broadband services, including cable modem service, *information service providers* do not have ready access to such platforms for the provision of their services to their customers. First, cable companies are regulated under Title VI, not Title II of the Act, and thus are not required to open their underlying transmission facilities to ISPs insofar as they are providing cable service. Indeed, with respect to cable modem services, the Commission recently found that cable modem service does not include an offering of telecommunications services to the public.[116] The Commission also found that the *Computer II* requirements governing the unbundling of transmission facilities do not apply to cable operators providing cable modem services, and even if they did, the Commission waived the requirements on its own motion.[117]

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114 *NPRM* at para. 36.

115 *Id.*

116 *See In Re Inquiry Concerning High-Speed access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking,* GN Docket No. 00-185, FCC 02-77 at paras. 45-47, 95 (rel. Mar. 15, 2002).

117 *Id.* at paras. 43-45.

Even though a few cable operators are providing transmission services to unaffiliated ISPs by choice[118] or pursuant to a government decree,[119] this access is extremely limited and only available to a few ISPs. Moreover, differences between their respective customer bases render cable modem services, which focuses primarily on residential customers, an inadequate substitute for ISPs targeting business customers.

In addition, the other platforms, wireless and satellite, are not only still in their infancy, but, like cable, are not regulated as Title II common carriers. Thus, access to these transmission services also are not readily available to ISPs. Thus, as explained herein,[120] the transmission facilities of dominant facilities-based common carriers still are "the primary, if not exclusive, means through which ISPs can obtain access to customers." If *Computer Inquiry* safeguards are not in place, the ILECs will not be required to provide competing ISPs with the transmission capacity needed to provide their services to their customers. And, even if the ILECs were to provide such services, without the safeguards in place, there would be no assurances that such services would be provided on a non-discriminatory basis and under the same terms and conditions that the ILECs obtain to provide their own enhanced services. As a result, competing ISPs would effectively be cut off from providing wireline broadband internet access services, especially where intermodal competition between delivery platforms has a diminutive ameliorating effect on the ability of ISPs to reach their customers. Accordingly, intermodal competition does not reduce the need for application of Title II safeguards to LECs.

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118 *See* Comcast Corp, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002.

119 *See* FTC AOL Time Warner Merger Order, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, §§ II, III (December 14, 2000).

F. *Computer Inquiry* Safeguards Should Be Preserved and Expanded

At a minimum, for the reasons stated above, the Commission should continue to apply the existing *Computer Inquiry* safeguards to the BOCs with respect to their provision of broadband Internet access services.[121] However, as documented in comments filed in the Commission's *Computer III Further Remand FNPRM* , and incorporated by the *NPRM* into this proceeding, the BOCs have engaged in systematic anti-competitive and discriminatory behavior in the broadband services market despite the existing safeguards.[122] Accordingly, the Commission should strengthen safeguards.

As suggested by commenters in response to the Commission's *Computer III Further Remand FNPRM*, the Commission should consider modifying existing safeguards and/or imposing additional requirements on the BOCs in the provision of broadband internet access services. Some suggested changes may include the following:[123]

- Require complete structural separation between BOC wholesale and retail operations;
- Make all agreements between the BOCs and their ISPs available to the public;
- Impose reporting requirements to monitor BOC compliance, including performance metrics regarding installation intervals;
- Enforce existing joint marketing safeguards and implement additional safeguards for ensuring equitable marketing opportunities; and,
- Require non-discriminatory access to BOC ordering and billing systems.

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120 *See supra* pp. 20-22.

121 *See supra* IV.A – IV.E.

122 *See* Initial Comments of the California ISP Association, Inc., CC Docket Nos. 95-20 and 98-10 (filed April 16, 2001).

123 *Id.* at 30-35.

The BOCs have demonstrated that they are able and willing to discriminate and engage in anti-competitive behavior in the provision of broadband access services. It is essential that the Commission maintain, at a minimum, the existing *Computer Inquiry* safeguards, but it also should consider modifying or establishing additional safeguards to protect competitors from such anti-competitive behavior and to ensure that competing ISPs have access to essential bottleneck transmission facilities and services on non-discriminatory terms and conditions.

V. TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS IS IN THE PUBLIC INTEREST

A. Non-Discrimination Safeguards Have Been the Foundation for the Growth and Success of the Information Service Marketplace

As discussed in these comments, the *Computer II* regulatory framework was designed to promote and achieve a deregulated information services marketplace. That framework has succeeded in spectacular fashion so that the Internet and the associated increase in demand for telecommunications services has been a key growth factor for the United States economy and made the United States the world leader in telecommunications technology.

Independent ISPs have played a key role in bringing the benefits of the Internet to consumers and businesses. As noted elsewhere in these comments, ILECs have strong incentives not to use their facilities to provide new, innovative services to consumers especially on a more efficient basis because this will cannibalize existing services. It has therefore frequently been the case that independent ISPs have been the first to bring new services to consumers. For example, independent ISPs pioneered self-installed DSL, which ILECs subsequently borrowed, and which has been a key factor facilitating the growth of DSL service.

Independent ISPs are also actively exploring provision of second line voice service over DSL, which would permit consumers to receive multiple voice lines for less than what ILECs charge.

However, this growth and success of the Internet, and the contribution of independent ISPs, would not have occurred if safeguards, including the *Computer II* unbundling obligations, had not been in place to assure that BOCs could not leverage their control of the local network into control of the information services marketplace. In short, the Commission's assertion of Title II authority and imposition of appropriate safeguards has strongly served the public interest and should remain in place.

B. Characterization of the Transmission Component of Wireline Broadband Internet Access As a Telecommunications Service Is Essential to the Long-Term Viability of Universal Service Funding

As explained in Section X, *infra,* universal service contribution obligations will most clearly apply to the extent a carrier provides interstate telecommunications service. Therefore, the Commission's tentative conclusion in the *NPRM* that wireline broadband Internet access providers are providing only an information service threatens the long-term viability of universal service funding. This is especially true given that the public switched network will, over time, become integrated with, and inseparable from, the Internet. Therefore, the Commission should conclude that broadband wireline Internet access is comprised in part of an offering of telecommunications service.

C. ILECs Can Contribute Most to the Public Interest By Participating in the Broadband Marketplace As Common Carriers

Classifying some or all of the broadband capability that ILECs use to provide Internet access as only subject to Title I would mean, of course, that this capability is not subject to

common carrier obligations. However, it is the unique status of ILECs as common carriers that enables them to best contribute to the public interest. ISPs do not have open access to other platforms providing broadband services.[124] The platforms over which cable modem services and satellite and wireless broadband access services are provided are not generally commercially accessible to unaffiliated ISPs. Nor is there currently any regulatory mandate that requires these providers to open up their platforms to competing ISPs. ILECs' participation in the broadband marketplace as common carriers promotes access by consumers and businesses to a wide range of information sources. Accordingly, the Commission should require that ILECs offer broadband capability subject to common carrier obligations, and as customers of their own tariffed broadband transmission services.

D. State Authority Could be Adversely Impacted

In the *NPRM*, the Commission seeks comment on how classification of wireline broadband Internet access services as exclusively an information service would impact the balance of federal and state responsibilities over the network, particularly in light of the fact that the Commission has found that xDSL transmission used to provide Internet access services are subject to Commission jurisdiction.[125]

Under the Act, states exercise authority over intrastate telecommunications service which they regulate as common carriage. The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communication

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124 *See infra* pp. 46-48.

125 *See NPRM*, at para. 62.

service . . ."[126] A pronouncement by the Commission that ILEC broadband capability is, in fact, not subject to common carrier regulation because it is used exclusively to provide an information service could have profound impacts on the ability of states to regulate broadband services.

States play an important role in the regulation of wireline broadband Internet access and protecting consumer interests. Commenters and other ISP associations have frequently needed to seek oversight of ILEC anticompetitive practices by state PUCs.[127] For example, the Illinois Commerce Commission ("ICC") has ensured competition in the provision of broadband Internet access facilities. In October 1999, SBC announced its $6 billion Project Pronto initiative to extend new fiber-fed loop facilities to millions of end-users. In February 2001, the Illinois Commerce Commission became the first state commission to order the unbundling of the fiber-fed loop architecture.[128] (Since that time the Tennessee Regulatory Authority and the Wisconsin Public Service Commission also have ordered unbundling of the fiber-fed loop.)[129] In the course

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126 47 U.S.C. § 152(2)(b).

127 *See, e.g.* In the Matter of the Filing of U.S. West Communications, Inc. for Approval of a New Digital Subscriber Line Service Offering Denominated as "Megabit Service," First Supplemental Order Deferring Effective Date of Megasubscriber Service, Docket No. UT 980416, Washington Utilities and Transportation Commission, June 18, 1998; *In the Matter of Investigation Into U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Washington Utilities and Transportation Commission Docket No. UT-003022, Petition to Intervene of Washington Association of Internet Service Providers, June 7, 2001.

128 *See Arbitration Decision on Rehearing, In the Matter of Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a/ Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al., Illinois Commerce Commission,* Docket Nos. 00-0312 and 00-0313, Illinois Commerce Commission (Feb. 15, 2001) and Order (Mar. 14, 2001). The Illinois decision established four new UNEs: (1) the subloop from the customer to the line card; (2) the line card itself; (3) the subloop from the line card to the OCD, and; (4) a port on the OCD. The decision also guarantees the right of CLECs to collocate their own line cards in SWBT's channel bank at the remote terminal.

129 See *Generic Docket to Establish UNE Prices for Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123*, Tennessee. Regulatory Authority, First Initial Order, Docket No. 00-00544 (Apr. 3, 2002); *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161 (Mar. 22, 2002).

of the Illinois deliberations, Ed Whitacre, Chairman and CEO of SBC, wrote in a letter to Speaker Hastert and other legislators that the Illinois decision would make it "economically impossible" for SBC to deploy Project Pronto in the state. The letter warned that, because of SBC's decision to halt Project Pronto in Illinois, the affected consumers "cannot now, and may never, have access to DSL."[130] Commissioner Harvill poignantly noted that the very fact that SBC's threatened halt to Project Pronto could mean that some consumers would never have access to DSL demonstrated precisely SBC's dominance of the market and therefore why it was important for the ICC to enforce aggressively SBC's unbundling obligations.

Moreover, there are many companies and institutions that implement wireline broadband Internet access services on an intrastate basis. For example, some companies and institutions use broadband for intra-company purposes such as linking offices located in different parts of the same state. If the Commission were to classify wireline broadband Internet access services as an information service, state commissions could lose jurisdiction over purely intrastate service offerings.

Contrary to the *GTE Order,*[131] states have concurrent jurisdiction over the provision of xDSL services used to provide Internet access services. While the Commission has asserted exclusive jurisdiction over special access services with more than 10% interstate traffic,[132] the Commission has never justified application of this rule to telecommunications services, such as

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130 Letter from Ed Whitacre, Chairman and Chief Executive Officer, SBC Communications, Inc., to the Honorable J. Dennis Hastert, U.S. House of Representatives 1 (Mar. 14, 2001) <http://www.icc.state.il.us/icc/tc/cond29.asp>

131 *See GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. Oct. 30, 1998) ("*GTE Order*").

132 *Id.*

DSL, used in provision of Internet access service. In fact there is a significant doubt as to extent of jurisdictionally interstate Internet access traffic. Email frequently has a local termination point as does web access due to caching on local servers of the most frequently visited web sites. Nor has the Commission ever explained how the jurisdictional nature of Internet traffic would be measured. For "always on" DSL connections, most of the traffic is intrastate because during idle time the DSL modem and DLSAM are merely sending "hand shaking" signals to each other. Accordingly, there is at this point little basis for the Commission to assert exclusive jurisdiction over telecommunications services used in provision of Internet access service.

In order to displace state regulation, congressional intent must be "clear and manifest."[133] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[134] Under Section 2(b) of the Act Congress left the states with substantial authority so long as state regulation does not conflict with the Commission's authority over interstate communications. Therefore, the Commission should define wireline broadband Internet access service as a telecommunications service to preserve state authority over ILEC intrastate broadband services.

VI. TITLE II PROVIDES THE BEST BASIS FOR ESTABLISHING A LEVEL INTERMODAL PLAYING FIELD

A. ILECS May Compete Intermodally As Common Carriers Subject to Title II

ILECs have recently conducted public policy initiatives before Congress and this Commission attempting to persuade policy makers that they must be relieved of all obligations to permit access by intramodal competitors to the broadband capability of their networks because of

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133 *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

134 *See Communications Systems Intnt'l v. the Cal. Pub. Utils. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

intermodal competition from cable operators. Thus, preceding the *NPRM,* ILECs urged the Commission to define their broadband network capability as subject only to Title I and will undoubtedly do so in this proceeding.[135]

The Commission should reject this argument because ILECs are fully able to compete intermodally as common carriers subject to Title II. Under the current regulatory regime, ILECs are able to provide Internet access and other information services including video programming as customers of their own common carrier services. Thus, they are not precluded from competing under current rules. In fact, as noted herein, ILECs have been spectacularly successful in rolling out DSL service. ILECs provide 93% of intramodal broadband Internet access and nearly half of intermodal broadband Internet access. These facts by themselves completely refute ILEC claims that they are hindered by Title II regulation in competing intermodally in the broadband marketplace. Therefore, ILEC arguments that they should be relieved of Title II obligations to provide nondiscriminatory access to ISPs in order to permit intermodal competition is no more than an attempt to manipulate policy makers to grant ILECs' long cherished goal of being able to engage in systematic discrimination against their ISP competitors. However, even under current safeguards, ILECs persist in efforts to harm, and discriminate against, ISP competitors, as discussed in these comments.[136] This discrimination is regrettably the primary explanation as to why ILECs have been successful in capturing 93% of the intramodal broadband Internet access market.

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135 *See*, Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002), cited at fn. 61, *NPRM.*

136 See *infra* VIII.

VII. DEREGULATION OF ILEC BROADBAND WIRELINE INTERNET ACCESS SERVICE WOULD NOT PROMOTE AVAILABILITY OF BROADBAND SERVICES

A. ILECs Are Already Deploying a Broadband Capability

ILECs have already widely deployed a broadband capability, and are rapidly installing an even more robust broadband capability in their existing networks. For example, the following facts, most of which come from the ILECs themselves, show that they are increasing the deployment of a broadband capability notwithstanding Title II and other the regulatory obligations:

- BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was "the fastest growth of any DSL or cable provider in the country."[137]
- BellSouth claimed that it had "the most aggressive DSL deployment strategy in the industry" and that it had increased its DSL coverage from 45% to 70% of households in 2001. [138]
- In its fourth quarter, year-end 2001 results report, Qwest stated that "DSL, wireless and Internet services continue to be key growth products."[139]
- Qwest's DSL customers at the end of 2001 represented a 74% increase from the end of 2000.[140]

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137 BellSouth investor news, "BellSouth Reports Fourth Quarter Earnings," http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002).

138 Newsroom, "BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines," http://bellsouthcorp.com/proactive/newsroom/release (Jan. 3, 2002).

139 "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

140 *Id.*

- In a January 24, 2002, "Investor Briefing" SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[141]
- SBC announced growth in its data services of between 14.4% and 27.9% in 2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.[142]
- Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[143]
- By year-end 2001, Qwest had increased by 15% over year-end 2000 the number of its central offices equipped for DSL.[144]
- In 1999, SBC launched "Project Pronto," a $5 billion investment in high-speed broadband services to residential consumers.[145]
- SBC also continued expansion of its broadband network capabilities, with 25 million DSL-capable customer locations at year's end. In 2001, SBC's DSL-capable footprint expanded by more than 6.7 million customer locations, or 37 percent.[146]

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141 SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings/1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

142 SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

143 "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

144 "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

145 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, ¶ 70 (rel. Feb. 6, 2002) ("*Third Section 706 Report*").

146 SBC-Investor Relations-Investor Briefings, "Revenue and Expense trends," http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings (March 20, 2002).

- In June 2001, Verizon informed the New York Public Service Commission that the "unprecedented and unpredictable demand" for high-speed data circuits required increased capital spending and the deployment of new technologies.[147]
- Verizon also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000.[148]

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities, including fiber in the loop. This deployment is occurring in spite of the Commission's determination that DSL and other broadband services are telecommunications services subject to common carrier regulation[149] and that advanced networks are fully subject to Section 251(c)(3) unbundling obligations.[150] Therefore, regardless of selected pronouncements from ILECs' regulatory spokespersons, their actions reveal that regulatory obligations have not inhibited their investment in broadband infrastructure and deployment of broadband services.

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147 *See*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Cases 00-C-2051 and 92-C-0665, Opinion No. 01-1, NYPSC, June 15, 2001, p. 10.

148 News Release, "Verizon Communications Second Quarter Earnings Highlighted by Strong Long-Distance and Wireless Sales," http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=59168 (July 31, 2001).

149 *Deployment of Wireline Service Offering Advanced Telecommunication Capability* 13 FCC Rcd 24012, 24029, para. 35 (1998) ("*Advanced Service Order*"). *See also* Comments of PacBell, CC Docket No. 98-103, filed Sept. 11, 1998, p. 14 ("ADSL is clearly a 'telecommunications service' that will be used to originate and terminate interstate telecommunications.")

150 *Deployment of Wireline Service Offering Advanced Telecommunication Capability, 13 FCC Rcd 24011* (1998).

B. Factors Other Than Regulation Fully Account for the Pace of Broadband Deployment

To the extent broadband is not being deployed quickly enough, which is not the case according to the Commission's *Advanced Services Reports*, this is attributable to factors other than common carrier regulation of broadband services. First, there are no services for which wireline broadband networks more advanced than those already in place are necessary. This phenomenon is referred to as the lack of a "killer application." Video programming is available from several sources including over-the-air broadcast, cable, satellite, videocassettes and DVDs. High speed web browsing is already available through DSL and cable modem service, although these services are not necessarily substitutes for each other. Businesses have been able for years to obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services. In short, futuristic ubiquitous wireline broadband networks have not been built because there is insufficient demand for them.

In a refreshing change from ILEC and other government views, it was recently reported that the Administration has recognized that demand, not supply, is limiting the growth of broadband networks (again, assuming that they are not being deployed fast enough, which is not the case).[151] Glenn Hubbard, Chairman of the President's Council of Economic Advisors stated:

> "Many consumers don't yet see the value of broadband," he said, pointing to the fact that in Atlanta, [a] price point of zero still wasn't sufficient motivation for half of consumers. As far as Bush Administration is concerned, he said, policy decisions can have "bigger impact on the demand side ..."[152]

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151 "Bush Administration Focuses on Increasing Demand for Broadband," Communications Daily, March 6, 2002, p. 3.

152 *Id.*

Second, ubiquitous advanced broadband networks have not been built because the technical solutions that might make them affordable have not yet been invented. Recent studies show that consumers are unwilling to pay more than $25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.[153] The ILECs have dangled the prospect of a kind of super-broadband "passive optical network," bringing fiber optics as close to consumers as possible.[154] But given that the ILECs' own funded studies estimate that the cost of deploying such gold-plated networks nationwide would be $270 billion to $416 billion,[155] it is clear that this type of network is not currently economically feasible.

Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the broadband marketplace, there is no reason to believe that this would result in widespread deployment of more advanced broadband networks, simply because the costs thereof are more than consumers are willing to pay. In fact, ILECs will not build these futuristic networks unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.

In fact, the Commission itself has provided an explanation for the recent slowdown in the pace of increased investment in broadband networks:

> " [I]ndustry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market. Although analysts still generally expect this trend to continue, they observe that there has been a recent slowdown in investment

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153 "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, http://www.c.ec-planet.com/news/02feb2002/18broadband.html

154 Communications Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

155 *Id.*

> caused by the economic downturn generally and, more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors.[156]

Therefore, there is no basis for the Commission to conclude in this proceeding that removal of common carrier regulation from ILEC broadband capability would promote its broadband goals.

C. ILECs Have Strong Incentives Not to Deploy Broadband

Although only ILECs possess ubiquitous networks that can be used to provide services to consumers and businesses, they are not the best source of innovation in provision of services over those networks. In fact, ILECs are slow to roll out new services, and have strong incentives not to deploy, new, efficient services that will compete with, and cannibalize, existing services. Thus, CLECs, in contrast to ILECs, worked cooperatively with their ISP customers to serve ISP needs, who, in turn, have been a key driver in the development and deployment of new advanced services. ISPs have pioneered a myriad of advanced services, such as Internet telephony, unified messaging, and MP3 technology, that promise to revolutionize the telecommunications industry.

ILECs' pattern of deployment of DSL capable networks perfectly illustrates that ILECs are not sources of innovation and prefer to maintain revenues from existing services. In a nutshell, ILECs ignored DSL until CLECs began to deploy it. As the President's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors attempting to use the local-competition

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[156] *Third Section 706 Report* at para. 62 (footnotes omitted).

> provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[157]

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[158] That decision is unsurprising and perhaps even economically rational from the ILECs' point of view, but consumers and businesses were required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services.

Moreover, it is not coincidental that after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were scaling back DSL investment somewhat – although even this maneuver did not prevent them from achieving the record-breaking growth discussed above, so that they now control over 90% of DSL customers.[159] For example, in October 2001, SBC scaled back its original deployment plan for Project Pronto and reduced capital spending by 20% in 2002.[160] In short, to the extent any diagnosis other than the general recession is needed to explain these modest scalebacks, it is apparent that ILECs no longer feel the need to invest quite so rapidly in light of the diminished threat of competition from CLECs. It is also worth noting that some ILECs substantially raised prices for DSL service, which never would have happened in a competitive market. To name

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157 ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf).

158 James Glassman, "Best Remedy for Recession? Break Up the Bells," http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131 (December 10, 2001).

159 New York Times, August 6, 2001, at C1 "Bell Companies Blamed for D.S.L.'s Woes."

160 SBC Advanced Solutions, Inc., Tariff FCC No. 1, pp. 60-69 (eff. Sept. 10, 2001); SBC Second Quarter Briefing, at 5.

only one, in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL was declining).[161]

As a group of distinguished economists explained in a December 2001 letter to Commerce Secretary Donald Evans: "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by limiting its use and raising its price."[162] In a perfect illustration of this point, SBC reduced investment and raised prices as soon as the threat of broadband competition diminished.

The *NPRM* fails to acknowledge that it is competition, not deregulation, that best motivates ILECs to invest in broadband and that it is the availability of incumbent networks on a common carrier unbundled basis to ISPs that permits them to provide services that can compete with ILECs. Accordingly, the Commission should conclude that requiring ILECs to provide broadband facilities to ISPs as part of Title II obligations will help achieve the competition that can best encourage ILECs to build broadband networks.

VIII. THE COMMISSION SHOULD EVALUATE ISSUES IN THIS PROCEEDING IN LIGHT OF PERSISTENT ILEC DISCRIMINATION AGAINST ISPs

As demonstrated in comments filed in the Commission's *Computer III Further Remand* proceeding and in proceedings before state commissions, the ILECs' anti-competitive behavior

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161 SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management," Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002)).

162 Letter from William J. Baumol et al. to Honorable Donald L. Evans et al., dated December 11, 2001, at 3.

reflects not only the need for stricter enforcement of existing common carrier regulations and *Computer Inquiry* requirements,[163] ILECs continue to use their dominant power over bottleneck facilities and services to impede competition by independent ISPs. For example:

- ILECs are misrepresenting loop qualification and are misleading consumers by advising them that only the ILEC ISP is able to provide them DSL services despite the fact that certain independent ISPs are in their system.[164]
- ILECs are favoring their affiliated ISPs in the provision of DSLAM port allocations, both in terms of availability and timing.[165]
- ILECs are sabotaging existing DSL services by disconnecting existing DSL lines provided to unaffiliated ISPs and then providing those lines to their affiliates.[166]
- ILEC-affiliated ISPs are obtaining advanced notice of availability of broadband facilities, providing the affiliate ISP with a marketing advantage, as well as preferential access to essential facilities with limited availability.[167]
- ILECs are engaged in "price squeezing" and are providing their affiliate ISPs with preferential pricing of DSL services, as well as superior access to the ILECs' ordering and billing systems.[168]
- ILECs are engaged in joint marketing abuses and misuse of CPNI in marketing broadband services,[169] including attempting to persuade independent ISP customers to switch to the ILEC affiliated ISP when the customer contacts the ISP concerning non-ISP services;
- ILECs have established practices of referring customers to a "preferred" ISP.[170]
- The ILECs' quality of service to independent ISPs is extremely poor and includes numerous service interruptions and outages, as well as substantial delays in obtaining network access.[171]

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163 *See* Initial Comments of the California ISP Association, Inc., CC Docket Nos. 95-20, 98-10 (filed April 16, 2001) ("CISPA Comments"); Comments of the United States Internet Service Providers Alliance, CC Docket Nos. 95-20, 98-10 (filed April 16, 2001) ("USISPA Comments"); Reply Comments of the Texas Internet Service Providers Association, CC Docket Nos. 95-20, 98-10 (filed April 30, 2001) ("TISPA Comments").

164 CISPA Comments at 14-15; TISPA Comments at 21-22.

165 CISPA Comments at 10-11.

166 *Id.* at 11-12.

167 *Id.* at 12-14; TISPA Comments at 28-31.

168 CISPA Comments at 16-18, 21-22; TISPA Comments at 21.

169 CISPA Comments at 24-26; TISPA Comments at 34-36.

170 *See, e.g.*; *In the Matter of Investigation Into U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, Response Testimony of Jared Reimer on Behalf of Washington Association of Internet Service Providers, Washington Utilities and Transportation Commission.

171 TISPA Comments at 17-18.

- ILECs are imposing unreasonable conditions on independent ISPs, such as excessive minimum capacity requirements, that are especially detrimental to small and mid-sized ISPs.
- ILECs have engaged in "slamming" by connecting customers to the ILECs affiliated ISP rather than the requested independent ISP, and then substantially delay correcting the problem;[172]
- ILECs have violated state conditions for nondiscriminatory provisioning of high-speed DSL services.[173]
- ILECs are imposing rate increases and other significant changes to the terms and conditions of tariffed DSL service without adequate notice or cost support.[174]

These and other ILEC practices verify that ILECs have the incentive and ability to harm ISP competitors even under current rules and would do so to a greater extent if the Commission adopts some of the proposals in the *NPRM*. As a result, independent ISPs are finding it increasingly difficult to compete with the ILECs in the provision of broadband services, and in certain cases, have been forced to cease providing such services altogether.[175] Much of this anti-competitive behavior demonstrates that the ILECs are openly violating the ONA, network disclosure and other requirements of the *Computer III* rules. Commenters urge the Commission to evaluate issues in this proceeding in light of this ILEC conduct, and increase, not decrease, oversight of ILEC provision of broadband access to independent ISPs.

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[172] *See* n. 176, *supra*.

[173] *See, e.g. In the Matter of the Filing of U.S. West Communications, Inc. for Approval of a New Digital Subscriber Line Service Offering Denominated as "Megabit Service,"* First Supplemental Order Deferring Effective Date of Megasubscriber Service, Docket No. UT 980416, Washington Utilities and Transportation Commission, June 18, 1998

[174] *See* In Re SBC Advanced Solutions, Inc. Texas Internet Service Providers Association Petition for Investigation, Suspension and Rejection of SBC-ASI Tariff, F.C.C. No. 1; TISPA Petition for Reconsideration and Application for Review of Special Permission No. 01-095, filed September 13, 2001,

IX. CHARACTERIZATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE IS ESSENTIAL TO IMPLEMENTATION OF NATIONAL SECURITY, PRIVACY, AND CONSUMER PROTECTION STATUTES

The Commission seeks comment on how its tentative conclusion that broadband Internet access service is an information service with a telecommunications component would affect obligations of telecommunications service providers concerning national security, network reliability, and consumer protection.[176] As discussed below, this tentative conclusion would thwart achievement of important national security, network reliability, and consumer protection goals.

A. CALEA

CALEA requires that all telecommunications carriers' equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications be capable of meeting specific law enforcement assistance capability requirements.[177] CALEA defines telecommunications carriers as "person[s] or entit[ies] engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[178] The definition of telecommunications carrier under CALEA excludes "persons or entities insofar as they are engaged in providing information services. . . ."[179] The Commission has determined that where facilities are used solely to provide an information service, whether offered by an exclusive information service provider or by a common carrier that has established

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175 CISPA Comments at 8, n.3.

176 *See Broadband NPRM*, at para. 54.

177 *See*, 47 U.S.C. Sec. 1001 et seq.

178 47 U.S.C. § 1001(8).

a dedicated information system apart from its telecommunications systems, such facilities are not subject to CALEA.[180] If the Commission were to determine that the provision of broadband Internet access service is an "information service" as opposed to a telecommunications service, CALEA would not apply to the provision of such service by telecommunications service providers. It is not realistic to expect that ILECs will build separate Internet access facilities. Nonetheless, categorizing broadband Internet access as an information service to this extent threatens to undermine CALEA and will undoubtedly complicate CALEA compliance. Moreover, it is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA. Therefore, the Commission should determine that wireline broadband Internet access is in part a telecommunications service in order to assure that the goals of CALEA are met and that law enforcement agencies have the necessary law enforcement tools as the public switched network evolves towards a more advanced broadband capability.

B. Network Reliability and Interconnectivity

Section 256 of the Act provides that the Commission "shall establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other *providers of telecommunications services* for the effective and efficient interconnection of public telecommunications networks used to *provide telecommunications services.*"[181] In enacting Section 256, Congress intended to preserve interconnectivity of the public telecommunications

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179 *See* 47 USC §1002(b)(2)(A).

180 *See Communications Assistance for Law Enforcement Act*, Further Notice of Proposed Rule Making, 13 FCC Rcd 22632 (1998), at para. 68.

181 47 U.S.C. Sec. 256 (b) (emphasis added).

network. However, the Commission's authority to oversee and coordinate network planning is limited in section 256 to telecommunications carriers and other providers of telecommunications services.[182] Therefore, if the Commission were to determine that broadband Internet access services are information services, the Commission would not be able to coordinate network planning and interconnectivity with respect to these services. Congress could not have intended for Section 256 to only apply to provision of narrowband telephone service. Accordingly, the Commission should classify the transmission component of wireline broadband Internet access in order to permit the Commission to oversee broadband interconnectivity as Congress intended.

C. Discontinuance of Service

Section 214 of the Communications Act limits the ability of telecommunications carriers to unilaterally discontinue telecommunications service. If the Commission were to find that facilities-based wireline broadband Internet access is exclusively an information service, providers would be able to discontinue service without regard to section 214. While the Commission notes that discontinuance applications are routinely granted,[183] the Commission's rules contain important consumer protection requirements requiring customer notice and allowing users to appeal to the Commission if the discontinuance will cause unanticipated harm to their business or the customers they serve. Moreover, as is well known, the Commission has recently started heightened oversight of discontinuance applications.[184] The increasing importance of broadband Internet connectivity to consumers and businesses, and the evolution of

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182 *See* 47 U.S.C. § 256(b).

183 *See Broadband NPRM*, at para. 57, n.99.

184 *Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act*, Public Notice, DA 01-1173, released May 8, 2001; *Requirements For Carriers to Obtain Authority Before Discontinuing Service in Emergencies*, Public Notice, DA 01-1257, released May 22, 2001.

the network toward integration with the Internet, mandates that the Commission maintains its regulatory oversight over the transmission component of wireline broadband Internet access service. Accordingly, the Commission should determine that the telecommunications component of broadband Internet access service is an offering of telecommunications service subject to Title II obligations in order to assure that discontinuances of service do not unduly harm the public interest.

D. Customer Proprietary Network Information

In order to safeguard consumer's privacy, the Act limits telecommunications carriers' dissemination of customer proprietary network information ("CPNI") derived from the provision of telecommunications services.[185] Thus, section 222(c)(1) specifies that the privacy protection requirements of that section apply to CPNI gained by a carrier "by virtue of its provision of a telecommunications service ..."[186] Therefore, if the Commission classifies wireline broadband Internet access service exclusively as an information service, CPNI gained by virtue of provision of wireline broadband Internet access will not be subject to the protections of Section 222. Congress could not have intended this result because under the current regulatory framework ILECs provide Internet access service as customers of their own tariffed telecommunications services and thus are subject to Section 222 with respect to the information services they provide using those tariffed services. Accordingly, the Commission should classify the provision of wireline broadband Internet access services as in part a telecommunications service in order to protect Consumers' privacy rights as intended by Section 222.

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185 *See* 47 U.S.C. § 222(a).

186 *See Id.* (emphasis added).

E. Access by Persons with Disabilities

Classifying wireline broadband Internet access as an information service would also eliminate the protections contained in the Act aimed at ensuring that telecommunications services are accessible and usable by persons with disabilities. Section 255 of the Act provides that " *a provider of telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[187] Classifying wireline broadband Internet access service as exclusively an information service would therefore exclude persons with disabilities from section 255 protections for wireline broadband Internet access services. Again, classifying wireline broadband Internet access services as an information services threatens to undermine yet another key consumer protection provision. Congress could not have intended this result. Therefore, the Commission should define wireline broadband Internet access as being comprised in part of an Internet access service in order to preserve access by persons with disabilities to the Internet.

F. Intermodal Competition Will Not Adequately Safeguard Consumers

The Commission also seeks comment generally on whether the consumer protections of the Act are necessary in light of the differences in the market structure between analog voice services and broadband Internet access services.[188] Specifically, the Commission refers to the fact that intermodal competition among multiple broadband platforms may eliminate the need for consumer protection regulations in the broadband Internet access services marketplace. The Joint Commenters submit that it is far too soon to know whether, and how, intermodal competition will develop in the broadband Internet access services marketplace. Only 4.4

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187 47 U.S.C. § 255 (c) (emphasis added).

percent of U.S. households had subscribed to broadband Internet access as of August 2000.[189] The penetration rate of broadband Internet access services is too low to extrapolate any useful data about what the larger market will eventually look like. Currently, the market is not dominated by many competitors, but by two: cable and DLS, both of which have been raising prices. In many geographic areas, broadband Internet access will probably be dominated by one provider for the foreseeable future due to the tremendous economic advantages that the "first mover" has in the deployment of facilities that support such services. Therefore, there is no basis for the Commission to conclude that intermodal competition has obviated the need for consumer protection provisions that would be undermined as explained above by determining that wireline broadband Internet access is exclusively an information service.

X. UNIVERSAL SERVICE ISSUES

A. Facilities-Based Wireline Broadband Internet Access Providers Are Subject to Universal Service Contribution Obligations Only to the Extent They Provide Telecommunications or Telecommunications Service

Section 254 of the Act requires carriers that provide interstate telecommunications services to contribute to universal service programs and permits the Commission to require any provider of interstate telecommunications to contribute if the public interest requires. Section 254(d) provides that:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the

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188 *See Broadband NPRM*, at para. 60.

189 *See Falling Through the Net: Toward Digital Inclusion*, National Telecommunications and Information Administration, at p. 101 (Oct. 2000).

> specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carriers' contribution to the preservation of and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.[190]

Although the statute on its face seems to identify only the carriers that must contribute, it may also limit contribution liability to the provision of interstate telecommunications or telecommunications service. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). The recent 5th *Circuit Universal Service Remand* calls into question the Commission's authority to impose assessments on a carriers' provision of service other than interstate telecommunications. Therefore, the Commission will be best able to assess universal service contributions on facilities-based broadband Internet access service providers if it concludes in this proceeding that wireline broadband Internet access service includes a separate offering of telecommunications service.

The *NPRM*, however, tentatively concluded that wireline broadband Internet access service is provision only of an information service. Thus, the Commission stated that the provider is not offering or providing telecommunications to anyone, rather the provider uses telecommunications to provide only Internet access service. For all the reasons stated elsewhere in these comments, the Commission should conclude that wireline broadband Internet access service includes a bundled offering of telecommunications service. As also noted, the network is rapidly moving toward a fully packetized network using IP so that the Internet will be the network. Accordingly, the Commission should determine in this proceeding that that wireline

[190] 47 U.S.C. § 254(d).

broadband Internet access service includes a bundled offering of telecommunications service for the additional reason that this will help assure the long term viability of universal service funding.

B. The Commission Should Reaffirm that Non-Facilities-Based ISPs Are Not Subject to Universal Service Contribution Obligations

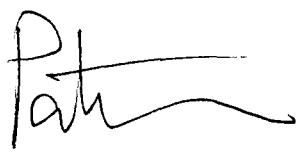
Information service providers have been exempted to date from unused service obligations because they use telecommunications, but do not provide it. This is still applicable for ISPs that do not own their own transmission facilities. As the Commission recognized, non-facilities-based ISPs are not and should not be required to contribute to universal service.[191] The Commission should reaffirm that conclusion.

[191] *See, e.g., NPRM* at para. 74.

XI. CONCLUSION

For the reasons stated herein, the Commission should conclude this proceeding consistent with Commenters' recommendations.

Respectfully submitted,



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